FRED L. DAILEY, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE v. USDA.
No. 01-3146.
Filed December 3, 2002.
(Cite as: 2002 W L 317 80191 (6th Cir.(Ohio))).

FMIA – PPIA – Fifth Amendment – Tenth Amendment – Commerce Clause –Arbitrary and capricious, when not – Agency regulations, deference given to.

The court dismissed the State of Ohio's challenge of the Secretary's authority regarding the Poultry Products Inspection Act (PPIA) [and Federal Meat Inspection Act (FMIA)] on several constitutional grounds. The Secretary's regulations imposed strict limitations on meat processing operations with solely intrastate activities such that with the "at least equal to" state inspections requirements, they were effectively forced out of business. Ohio argued that under Fifth Amendment grounds, the Secretary's regulations were arbitrary and capricious because they were not grounded with a rational purpose. Ohio argued that under Tenth Amendment grounds, the Secretary's regulations impermissibly intruded into state's rights by forcing Ohio to either set up a State inspection program which must satisfy Federal regulations or abandon any efforts to have a state program and authorize Federal inspectors to directly inspect poultry operations with the result that many small state operators would be unable to meet Federal standards and be forced out of business. Ohio argues that since State inspected poultry can not be shipped interstate that by definition there is no interstate commerce under which the Secretary derived authority for enforcement of the Act.

United States Court of Appeals, Sixth Circuit.[*]

On Appeal from the United States District Court for the Southern District of Ohio.

Before GUY and BATCHELDER, Circuit Judges; and QUIST, District Judge.[1]

BATCHELDER, Circuit Judge.

The Ohio Department of Agriculture ("Ohio Department") and its Director, Fred L. Dailey, appeal the district court's order granting the motion of the United States Department of Agriculture ("USDA") and its Secretary, Ann M. Veneman ("Secretary") to dismiss the plaintiffs' complaint under Fed.R.Civ.P. 12(b)(6). The plaintiffs brought this action seeking declaratory and injunctive relief, arguing that the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. §§ 601-80, the Poultry

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[*] Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit.

[1] The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

Products Inspection Act ("PPIA"), 21 U.S.C. §§ 451-70 (collectively, the "Meat and Poultry Acts"), and their implementing regulations. 9 C.F.R. 301, et seq., and 9 C.F.R. 381, et seq., respectively, are unconstitutional because they violate the plaintiff's rights under the equal protection component of the Fifth Amendment's Due Process Clause; because they exceed Congress's power under the Commerce Clause; and because they unconstitutionally commandeer Ohio's legislative process, in violation of the Tenth Amendment. The plaintiffs also argue that specific regulations that implement the Meat and Poultry Acts, namely 9 C.F.R. §§ 318.1 and 381.145, exceed the defendants' regulatory authority. Because we conclude that the plaintiffs, while raising concerns of federalism to which we are sympathetic, nonetheless cannot demonstrate that the federal statutes and regulations they challenge here are unconstitutional, we will affirm the judgment of the district court.

Statement of Facts

The FMIA governs the slaughtering of livestock and the processing and distribution of meat products in the United States; the PPIA governs the slaughtering, processing, and distribution of poultry products. In accordance with §§ 603 and 621 of the FMIA and § 463 of the PPIA, among other provisions, the Secretary is authorized to make rules and regulations setting national standards for meat and poultry inspection. To that end, the Secretary has promulgated 9 C.F .R. Subchapter A. Part 301. et seq., which regulates meat inspection, and 9 C.F.R. Subchapter C, Part 381, et seq., which regulates poultry inspection. Under the FMIA and PPIA and their corresponding regulations there are three different types of meat and poultry establishments or plants: (1) federally inspected plants; (2) foreign-inspected plants, whose meat and poultry is federally inspected when it enters the United States; and (3) state-inspected plants.

For federally inspected plants, the Meat and Poultry Acts charge the Secretary with a number of responsibilities, including ante- and post-mortem inspection of the livestock and carcasses, sanitation inspection in the establishments, enforcement of record-keeping requirements, and the training and supplying of inspectors to carry out these responsibilities. *See* 21 U.S.C. §§ 602-06; id. §§ 455-57, 463. The Secretary in turn has established standards, including facilities requirements, inspection requirements, sanitation requirements, and record-keeping requirements. 9 C.F.R. §§ 301- 35, 381. Meat produced in a federally inspected plant may be sold in any state.

Foreign-inspected plants operate their own inspection systems under the general

supervision of the USDA. 21 U.S.C. §§ 620, 466. To be allowed to export to the United States, a foreign country must show that its system of inspection is "equivalent to" the federal inspection system. 9 C.F.R. § 327.2(a)(1). The USDA conducts its own inspection of foreign-inspected meat and poultry, though the level of the USDA's scrutiny depends on the inspection history of the particular country and plant. Under normal inspection, a sample from each lot is taken for inspection and the rest is immediately shipped to the United States. For plants with better compliance histories only one in four lots is inspected, and for the best plants only one in twelve. For plants with poor compliance every lot is inspected, and no product is shipped until the inspection is complete. USDA-approved meat and poultry from foreign plants may be sold in any state.

The Meat and Poultry Acts grant the Secretary authority to authorize each state to develop its own inspection program. 21 U.S.C. §§ 661, 454. To obtain this authorization, a state must have "enacted a State meat inspection law that imposes mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements that are at least equal to those under [the Meat and Poultry Acts]," 21 U.S.C. §§ 661(a)(1), 454(a)(1), and its inspection system must contain "authorities at least equal to those provided in [the Meat and Poultry Acts]." *Id.* §§ 661(a)(2), 454(a)(2). To demonstrate that it meets the "at least equal to" requirement, a state submits a "State Performance Plan" to the USDA's Food Safety and Inspection Service ("FSIS"). A benefit of the "at least equal to" requirement is that it allows state inspection programs to exceed the federal requirements if they wish- something which Ohio, for example, has done.

Once the Secretary has authorized a state's inspection program, the USDA monitors the state's compliance via annual certification and comprehensive reviews. In annual certification the USDA reviews each participating state's performance plan and determines whether the state has met the "at least equal to" requirements at the end of each fiscal year. In comprehensive reviews the USDA randomly selects state plants, reviews their records, and conducts in- plant inspections. Comprehensive reviews are conducted in a given state every one to five years, depending on which of the four FSIS ratings the state receives: acceptable, acceptable with minor variations, acceptable with significant variations, and unacceptable. In 1996 the FSIS comprehensively reviewed Ohio's meat and poultry inspection program, finding that Ohio met the "at least equal to" requirements, and rating the program "acceptable with minor variations." In 1997 six states received ratings of acceptable, fourteen were rated acceptable with minor variations, six were rated acceptable with significant variations, and no state program was deemed

unacceptable.[2]

Meat and poultry produced at state-inspected plants may be sold intrastate only, and may not be sold interstate. Nor may state-inspected meat or poultry be sold to a federally inspected plant for reprocessing. 21 U.S.C. §§ 610(c), 458(a)(2). This restriction is burdensome for state- inspected plants. Though individual state-inspected plants may petition the FSIS to be inspected instead under the federal system, many small plants cannot afford the renovations that would be required to meet federal standards. The consequence, as alleged by the Plaintiffs, is that many small and mid-size plants have gone out of business, unable to compete with the larger plants because they cannot send their meat or poultry out of the state.

Analysis

We review de novo a district court's dismissal of a complaint under Fed. R. Civ. Proc. 12(b)(6). Bird v. Parsons, 289 F.3d 865, 871 (6th Cir.2002). Like the district court, we assume that all of the Plaintiffs' factual allegations are true, and we may affirm the dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting Buchanan v. Apfel, 249 F.3d 485, 488 (6th Cir.2001)).

I. Fifth Amendment Equal Protection

[1] The Fifth Amendment prohibits Congress from depriving persons of life, liberty, or property without due process of law. Federal courts have discerned an equal protection component to this provision, and consequently "the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process." ' *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (quoting *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). Where, as here, Congress's differential treatment implicates neither a suspect classification nor a fundamental right, federal courts should uphold the legislation if it is rationally related to a legitimate legislative interest-which is to say that the unequal treatment may not be arbitrary, irrational, or capricious. Hadix v.

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[2]The meat and poultry plants in all other states were under federal supervision. When a state abandons its inspection program, the state's inspection facilities immediately fall under the supervision of the federal inspection system. Plants under state inspection are also returned to federal control if a previously authorized state fails to meet the Secretary's requirements. 21 U.S.C. §§ 661(c), 454(c).

Johnson, 230 F.3d 840, 843 (6th Cir.2000); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir.1997). Hence Ohio bears a heavy burden-to negate "every conceivable basis which might support [the legislation], . . . whether or not the basis has a foundation in the record," *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quotation marks and citation omitted)-and the Defendants need not produce any evidence to substantiate their replies, nor are they required to reply at all. Hadix, 230 F.3d at 843.

[2] Ohio argues that because, for purposes of the Defendants' 12(b)(6) motion, the district court had to accept as true Ohio's allegation that state- inspected meat and poultry is as safe as federally inspected and foreign- inspected meat and poultry, the Meat and Poultry Acts lack a rational basis for treating state-inspected meat and poultry differently from that produced in federally inspected and foreign plants. Nevertheless, assuming that it is true that state-inspected meat and poultry was and presently is as safe as that subject to the other types of inspections, the district court (and the government in enacting and perpetuating the Meat and Poultry Acts and their regulations) was not required to assume that this will always be the case in the future. Though the USDA does keep an eye on state inspection programs, it keeps yet a closer eye on its own plants and on meat and poultry entering the country, and it is possible that a state program could deteriorate for a time without the USDA's knowledge. This possibility provides a rational basis for Congress to restrict the interstate transport of state-inspected meat. Another rational basis for the discrimination is Congress's interest in uniformity: because state inspection programs can impose additional or different requirements as they comply with the "at least equal to" requirement, and because states can establish their own labeling systems, Congress may have wanted to avoid confusion by establishing a uniform standard for meat and poultry products shipped interstate. For these reasons, we find that the district court did not err in holding that the plaintiffs fail to state a claim under the Fifth Amendment's Due Process Clause.

II. Commerce Clause

Under the Commerce Clause, Congress may regulate three broad categories of activity: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) activities with a substantial relation to interstate commerce- activities, that is, "that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (quotation marks and citation omitted). We must reject a Commerce Clause challenge if Congress rationally could have concluded that the

regulated activity fit into one of these categories, and if Congress acted rationally in adopting that regulatory scheme. *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 276, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

[3] The plaintiffs' quarrel here is not with whether meat and poultry sold intrastate substantially affects interstate commerce, or whether Congress has a rational basis for regulating meat and poultry that remains within a state. Rather, they argue that Congress, by forbidding state-inspected meat and poultry from crossing state lines, has voluntarily stripped itself of authority to regulate state-inspected plants engaged in what is now a solely intrastate activity. Yet the plaintiffs cite no cases supporting this novel (though not illogical) proposition, nor are we aware of any. Congress's power to regulate things in interstate commerce surely includes the power to ensure that a commodity does not become a thing in interstate commerce; and meat and poultry products that are solely in intrastate commerce, when considered in the aggregate, have a substantial affect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 560, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (discussing the Court's finding in *Wickard v. Filburn*, 317 U.S. 111, 128, 63 S.Ct. 82, 87 L.Ed. 122 (1942) that home-grown wheat, even if it is never sold but is simply consumed at home, substantially affects interstate commerce because it competes with wheat that is sold in commerce). Federal regulation of those products in intrastate commerce, then, is not beyond Congress's power under the Commerce Clause.

III. Tenth Amendment

[4] Ohio contends that the Meat and Poultry Acts impermissibly commandeer Ohio's legislature and compel it to enforce the federal inspection laws, in violation of a principle derived from the Tenth Amendment and reiterated in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992): "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188. In New York, the states were offered a choice between regulating low-level radioactive waste according to the instructions of Congress or taking title to that waste. Neither of those, standing alone, was within the authority of Congress, the Court held, and "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all," and therefore " 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288).

The plaintiffs argue that the Meat and Poultry Acts present Ohio with similarly unsavory alternatives: the state must either continue to operate its own inspection program or face the prospect of being subjected to federal inspection, and the considerable expenses of converting to the latter would drive many small meat and poultry plants out of business. We disagree. Ohio's choice is either to conduct its own program or allow the federal government to take over, *see* 21 U.S.C. §§ 661(c), 454(c), and the Supreme Court has held that such choices do not amount to compulsion. *See New York*, 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress's power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."). Nor is the harm threatened here of the kind that the principle reiterated in New York is intended to prevent: the prospect of having small businesses fail due to conversion costs, though disagreeable, nevertheless affects Ohio only indirectly. *See*, e.g., *id.* at 168 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."). We conclude that the Plaintiffs' arguments fail.

IV. The Scope of the Secretary's Regulatory Authority

[5] We must uphold the Secretary's regulations unless they are "arbitrary, capricious, an abuse of discretion, [ ] otherwise not in accordance with law," or are "unsupported by substantial evidence." 5 U.S.C. § 706. When reviewing an agency's interpretation of a statute which that agency administers, we look to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Chevron established that where Congress has spoken to the precise question at issue, the court asks whether the interpretation of an agency that administers the statute is based on a permissible construction of the statute, and if it is then the court must defer to the agency's construction. *Id.* at 842-43. In the present case, the question is whether the Secretary had authority to order that state-inspected meat and poultry can enter federally inspected plants only if it is kept separately for storage and distribution, and that state-inspected poultry cannot be repackaged, relabeled, or processed in a federally inspected plant.

Specifically, Ohio challenges the regulations the Secretary promulgated under Section 605 of the FMIA and Section 465 of the PPIA. See 9 C.F.R. §§ 318.1(a), 318.1(h)(2), 381.145(a). Section 605 of the FMIA provides that

> [t]he Secretary may limit the entry of carcasses, parts of carcasses, meat and meat food products, and other materials into any [federally inspected] establishment . . ., under such conditions as he may prescribe to assure

> that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this [Act].

21 U.S.C. § 605; see also id. § 465 ("The Secretary may limit the entry of poultry products and other materials into any [federally inspected] establishment, under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this [Act].").

We conclude that Congress did not speak to the precise question at issue, leaving it instead to the Secretary to set out "such conditions as he may prescribe . . . [that] will be consistent with the purposes of this [Act]." 21 U.S.C. §§ 605, 465; see also 21 U.S.C. §§ 602, 452 (establishing that the purposes of the Meat and Poultry Acts are to ensure that meat and poultry is safe and healthy). Our inquiry, then, must be whether the Secretary's regulation is a permissible construction of the statute. We find that it is, for the reason noted above: the USDA does not scrutinize state-inspected plants as frequently as it does federally inspected plants or federally inspected foreign meat and poultry, and hence there is the possibility that state-inspected meat and poultry would not be as safe.

Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing the Plaintiffs' case.
